

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In re:)	
)	
National Assoc. of Broadcasters)	CS Dkt. No. 00-96
and Association of Local Television)	
Stations Emergency Petition for)	
Modification or Clarification of)	
Broadcast Carriage Rules for Satellite)	
Carriers)	
)	
Joint Comments of)	
)	
Hardy, Carey & Chautin, L.L.P. on behalf of)	
itself and the following named clients:)	
)	
LeSea Broadcasting Corporation, licensee of)	
KWHD-TV, Castle Rock, Colorado and)	
WHMB-TV, Indianapolis, Indiana;)	
)	
Christian Television Network, Inc., licensee of)	
WHTN-TV, Murfreesboro, Tennessee and)	
)	
Carolina Christian Broadcasting, Inc., licensee)	
of WGGG-TV, Greenville, South Carolina)	
)	
To: Chief, Cable Services Bureau		

Dated: January 22, 2002

TABLE OF CONTENTS

TABLE OF CONTENTS	i
SUMMARY	1
JOINT COMMENTS	2
I. Congress did not intend, nor does it sanction, a mandatory satellite carriage regime that inhibits the ability of some local stations to reach potential viewers.	2
II. The FCC never contemplated, nor do its rules permit, Echostar to relegate local independent stations to uninstalled “second dish” status.	5
III. Echostar’s scheme is discriminatory because it does not afford certain singled-out independent and affiliated stations equal access to subscribers.	7
A. Echostar groups independent and niche network stations on satellite orbital positions requiring second dishes, and thus discourages “second dish” orders.	7
B. If grouping independent and niche network stations on “second dish” status were not enough disincentive for subscribers, the hurdles and inconvenience of getting a second dish add even more.	12
C. The named commenters previously filed complaints against Echostar.	15
IV. The issues presented may be resolved by declaratory ruling, without the need for further rulemaking.	17
CONCLUSION	19

SUMMARY

Claiming to lack sufficient satellite capacity, Echostar has adopted a local television carriage scheme which it professes complies with the mandatory carriage requirements of the Satellite Home Viewer Improvement Act (“SHVIA”). The scheme, in place since at least January 1, 2002, gives major network affiliated stations immediate access to Echostar subscribers, who can receive these stations on an existing, installed dish, but isolates nearly every independent or niche network station on a separate satellite, and makes reception of these stations contingent upon the subscriber electing to arrange for and have installed a second dish, presumably at no charge.

Echostar’s carriage scheme, the stations it decided to relegate to “second dish” status, its failure to advise or promote its purported “free second dish” offer, and the obstacles, confusion and inconvenience of acquiring a second dish, all combine to discriminate against independent and niche network stations by denying them equal access to subscribers.

Echostar contends that its actions are acceptable under existing FCC rules and the SHVIA. In fact, its actions violate the spirit and letter of the law, and the FCC should clarify, in black and white, that Echostar’s actions, and any in the future which operate to deny stations access to subscribers, are discriminatory, and thus prohibited.

JOINT COMMENTS

Hardy, Carey & Chautin, L.L.P., on behalf of itself and certain of its affected clients (“HCC Commenters”), submits these joint comments (“HCC Joint Comments”) pursuant to Section 1.415 of the FCC’s rules and the FCC’s January 8, 2002 Public Notice requesting comments on the Emergency Petition of NAB and ALTV for Modification or Clarification of Broadcast Carriage Rules for Satellite Carriers (the “Emergency Petition”).¹ The HCC Commenters support the NAB Petition, and for the reasons below, urge the FCC to act quickly to clarify that the scope and meaning of the satellite mandatory carriage rules, when properly applied, grant all local television stations eligible for carriage equal access to Echostar subscribers in each market.

I. Congress did not intend, nor does it sanction, a mandatory satellite carriage regime that inhibits the ability of some local stations to reach potential viewers.

Congress adopted the Satellite Home Viewer Improvement Act (“SHVIA”) because “absent must-carry obligations, satellite carriers would carry the major network affiliates and few other signals.” SHVIA Conf. Rep. at 101. “Congress understood that the threat to over-the-air viewers was not the loss of broadcasting as a medium, but the loss of the independent stations needed to provide those viewers with a rich mix of broadcast programming from multiple sources.” *Satellite Broadcasting & Communications Ass’n v. FCC*, 2001 WL 1557809 *15 (4th Cir. Dec. 7, 2001) (henceforth “*SCBA v. FCC*”).

Congress recognized the potential negative impact of favored station “cherry-picking” by satellite carriers on the continued viability of independent stations, and to prevent this practice, adopted a market-by-market “carry one/carry all” statutory copyright

¹ See *Public Notice, National Association of Broadcasters and Association for Local Television Stations Seek Modification or Clarification of Broadcast Carriage Rules for Satellite Carriers*, CS Docket. No. 00-96, issued January 8, 2002 (hereinafter, “Public Notice”).

license. Importantly, Congress' based its decision in part on a "plausible and widely shared empirical assumption" -- that "satellite subscribers who are able to receive local network signals via satellite will be unlikely to obtain or maintain antennas in order to receive independent local broadcast stations." *See SHVIA Conf. Rep.* at 102, *as cited in SBCA v. FCC*, 2001 WL 1557809 *26 n.8 (4th Cir. Dec. 7, 2001). Congress clearly wanted complete carriage parity for independent stations so that they, like network stations, could reach all satellite subscribers unimpeded by subscriber reception obstacles.

Echostar has given network and other select local stations immediate access to every satellite subscriber in every market in which it is carrying local stations. But the vast majority of independent stations have been "locked out" and have no access to Echostar subscribers because Echostar has chosen to place virtually every one of them on a second satellite,² for which a second dish is needed. This, Echostar contends, satisfies their carriage obligation. That arrogant contention cannot be correct. It is simply implausible to believe that Congress intended to gut the very parity it sought for independent stations in adopting SHVIA by allowing satellite carriers to "cherry-pick" between network and independent stations when choosing which to place on uninstalled "second dish" status, even if the second dish were free.

The same "plausible and empirical assumption" Congress relied upon in adopting SHVIA illustrates why Echostar's position is wrong now. Just as the satellite subscriber already getting network stations is unlikely to obtain or maintain antennas to receive

² The term "second satellite" is used in these Comments to describe a satellite positioned at an orbital location other than that at which the satellites used by Echostar to provide the bulk of its programming to regular subscribers is located, and for which a second receive dish and/or other equipment is required.

independent stations, those getting local network signals now on an already installed and existing dish are unlikely to seek a second dish to receive independent local stations, even if they know of the availability of that second dish. Whether they have to pay for it is of no moment. They do not now receive the local independents and are unlikely, on their own volition, to take the necessary steps to get a second dish for a very few independent and niche network stations.

According to Congress, true “carriage” for independent stations meant immediate parity for all stations through equal access to the same number of subscribers. Under Echostar’s two-dish scheme, it is as if these independent stations are not even being carried. On January 1, 2002, they *automatically* were denied access to subscribers without second dishes. That status is not likely to change. Stations on a secondary satellite will continue to lose access to satellite subscribers because subscribers are significantly less likely to ever watch those stations if they already receive the network stations and must take extraordinary steps to receive only a few, independent stations. With each passing day subscribers do not take those extraordinary steps, the harm worsens. Loss of access results in lower ratings, which in turn lead to lower advertising revenues. *SCBA v. FCC*, 2001 WL 1557809 *17. Lower revenues lead to a decrease in programming quality, which then further depresses ratings and station revenues, all in a vicious cycle. *Id.* For these stations, Echostar is the very “bottleneck” by which they are disenfranchised. *Id.* Congress neither contemplated nor intended such a result, and would expect the FCC to clarify that Echostar’s actions violate the spirit and letter of the SHVIA.

II. The FCC never contemplated, nor do its rules permit, Echostar to relegate local independent stations to uninstalled “second dish” status.

In adopting rules to implement the SHVIA, the FCC recapped the overarching tenets of the Act and Congress’ intent as follows:

... Congress enacted Section 338 to preserve free over-the-air broadcasting, promote a multiplicity of voices, and promote fair competition between video providers. The SHVIA furthers these important government interests by establishing provisions ensuring that satellite carriers treat all local television stations seeking carriage in a *fair* manner.

Report & Order, *In re: Implementation of Satellite Home Viewer Improvement Act of 1999 - Broadcast Signal Carriage Issues* ¶13, CS Docket No. 00-96 (released Nov. 30, 2000)

(*emphasis supplied*) (“Report & Order”). Nothing in the Act or the FCC’s rules implementing it countenances unfair treatment of local television stations or any subscriber requirement that creates discriminatory effects.

Echostar has chosen a contorted interpretation of section 76.66(i)(4) of the rules to justify its actions. Section 76.6(i)(4) states:

Within a market, no satellite carrier shall provide local-into-local service in a manner that requires subscribers to obtain additional equipment at their own expense or for an additional carrier charge in order to obtain one or more local television broadcast signals if such equipment is not required for the receipt of other local television broadcast signals.

In short, this rule prohibits “satellite carriers from requiring subscribers to purchase additional equipment to gain access only to some, but not all, of the local signals in a market.” Recon Order, ¶41. Echostar twists the rule into a broad license to place certain independent stations on a separate satellite, for which a second dish is required but installed only upon request, as long as it is not requiring a customer to pay for the cost of a second dish. Where Echostar goes wrong is in assuming that removing the requirement to purchase

the additional equipment from the rule suddenly makes isolating independent and niche network stations acceptable or non-discriminatory. The rule does not go that far. It only says that making subscribers *pay* for another dish without all local channels would be discriminatory. It does not say, as Echostar fancies it does, that *not* making them pay for a dish without all local channels would be acceptable. Nor does it limit the universe of discriminatory behavior solely to requiring payment for a dish without all local channels.

Rather than distort a rule to justify its actions, Echostar should have considered whether its actions would create discriminatory effects. They would not have had to look far. Echostar could have studied Congressional intent, a task made simple by the summary provided by the 4th Circuit's decision. *See SBCA v. FCC*, 2001 WL 1557809 *15 (4th Cir. Dec. 7, 2001). The FCC's findings in adopting the rule would have also been instructive, for they strongly suggest that any discriminatory effect caused by Echostar's "free additional dish" scheme would be prohibited.

During its discussions of discriminatory pricing in both the Report & Order and Recon. Order, the FCC addressed a claim by both Echostar and DirecTV that a legislative drafting change to section 338 gave satellite carriers *carte blanche* to offer stations at different orbital locations and charge for additional dishes. The draft language would have required carriers to place broadcasters on contiguous channels without the need for subscribers to purchase an additional dish. The "additional dish" language was removed, and the carriers argued that this meant the FCC could not prohibit them from offering channels on different satellites and charging for second dishes. The FCC rejected the carriers' contention, stating:

The legislative draft change, at most, indicated that Congress did not want to prohibit satellite carriers from requiring additional dishes generally, but the change does not imply that

Congress wanted to allow satellite carriers to require additional dishes if such a requirement created discriminatory effects. We believe that a limited prohibition on requiring subscribers to obtain a separate dish to receive some local signals when other local signals are available without the separate dish is necessary to give full effect to local station carriage requirements.

Recon. Order, ¶41.

Thus, any requirement for an additional dish, whether for a price or for free, is barred if it creates a discriminatory effect. This is the standard to which Echostar must adhere, and which, as explained below, it violates. While even a rudimentary comprehension of Congress' intent is enough to make clear that Echostar's "free additional dish" scheme is discriminatory, a clarification to spell out that obvious conclusion is apparently needed.

III. Echostar's scheme is discriminatory because it does not afford certain singled-out independent and affiliated stations equal access to subscribers.

The discriminatory effect of Echostar's "second dish" scheme is practically choreographed through a series of conscious, deliberate choices designed to place lesser known independent and niche network stations at a disadvantage to their fellow local broadcast stations.

A. Echostar groups independent and niche network stations on satellite orbital positions requiring second dishes, and thus discourages "second dish" orders.

As of January 3, 2002, two days after satellite carriers were to fully comply with must-carry regulations, Echostar's web site indicated that it was offering local-into-local service in 35 different markets.³ In each market, every major network station (ABC, NBC, CBS & FOX), at least one PBS affiliate, and either (or most often both) WB and UPN

³ The statistical and other carriage facts summarized herein are based upon a January 3, 2002 visit to Echostar's web site, www.dishnetwork.com by undersigned counsel. Printed copies of each local market channel listing are available upon request.

affiliates are carried on existing "Dish 500" systems. Combining all 35 markets, a total of 247 stations, for an average of 7 stations per market, had "made" the Dish 500 list and gained immediate access to all Echostar satellite subscribers in their respective markets. No second dish was or is now needed to receive these major network affiliated stations.

Twenty-four of Echostar's 35 markets, or 68%, have stations listed as available on a different satellite and on an uninstalled "second dish."⁴ In those markets, a total of 67 stations are relegated to "second dish" status, for an average of 2.8 stations per market.

Those stations break down as follows:

Independent	30
Univision	9
PBS	17
Home Shopping	6
Telemundo	4
CBS High Definition	1

Presuming for illustration that these stations are technically being "carried,"⁵ they represent 21% of the total 347 local broadcast stations on Echostar's system nationwide. These stations, unlike their Dish 500 counterparts, do not now have access to Echostar subscribers, and never will unless, on their own volition, those subscribers decide to go through the administrative hurdles and personal inconvenience to have a second dish and new receiver

⁴ In the other 32% of the markets -- Austin, Birmingham, Cincinnati, Cleveland, Los Angeles, Minneapolis, Nashville, Portland, San Antonio, San Diego and Tampa-St Petersburg -- independent and niche network stations never even made it to "second dish" status.

⁵ Echostar divorces "reception" from the question of whether or not a station is being "carried."

installed.

Echostar thus first discriminates against independent and niche network stations by locating all but 4 independents on the “second dish required” satellite.⁶ This choice alone exponentially exacerbates the discriminatory effects of Echostar’s two-dish scheme, because it groups together on the second dish satellite the very stations that Congress knew satellite subscribers would not seek out. In many instances, the “group” consists of two or fewer stations, further reducing the subscriber incentive to get a second dish. For example, in the Indianapolis market, commenter LeSea’s WHMB-TV is only one of two stations on the “second dish” satellite. The other station is WTBU-TV, a PBS affiliate with programming linked to, and in some cases, duplicative of WFYI-TV, which is carried on the existing Dish 500 dish. In effect, Indianapolis Echostar subscribers would gain only one additional station – independent WHMB-TV – by getting a second dish. Precisely the same scenario is presented for commenter Carolina Christian’s WGGG-TV, which is only one of two (the other a second PBS station) stations on “second dish” status. The situation is even worse for commenter CTN’s WHTN-TV in the Nashville market.⁷ Independent WHTN-TV is the only television station Nashville subscribers would gain by adding a second dish. In all three situations, Echostar is dangling a single independent station on a second dish list, thereby rendering ever more remote the chance that a satellite subscriber will seek the

⁶ A single independent station made the Dish 500 list in Dallas, Orlando, Phoenix and Seattle.

⁷ WHTN was only added to the second dish list after CTN’s counsel wrote to Echostar’s David Goodfriend on January 4th. In response to CTN’s complaint for carriage of WHTN, Echostar had committed to carrying the station, but did not even bother to list it as available on a second dish until CTN brought that blatant discrimination to Echostar’s attention.

second dish.⁸ “Subscriber access denied” is Echostar’s mantra for these stations.

Echostar’s choice of which stations to place on “second dish” status appears calculated to save the company money. Using Echostar’s reported 6.1 million subscribers as of June 1, 2001,⁹ and a conservatively estimated average cost to Echostar of \$50.00 each, even if only half of them sought out the free second dish, it would have cost Echostar over \$150 million in equipment costs alone. Echostar, for its own self-serving economic reasons, put only a few independent and niche network stations on the second dish so they would incur the least amount of financial burden possible. To save money, Echostar knowingly thwarted Congress’ intent to protect the very stations the mandatory carriage rules were designed to benefit.

Had Echostar at least given the independent and niche network stations an equal percentage of the purported availability on the Dish 500 system, the discriminatory effect might have been lessened by at least increasing the incentive for subscribers to seek out and receive the second dish. But that would have required placing network affiliates on the less desirable second dish. Echostar deliberately chose not to do this. None of the widely viewed major network affiliates (ABC, NBS, CBS, FOX, PBS, WB, UPN) are ever listed on “second dish” status.

Echostar’s web site does not even make a general announcement about the availability of the stations on the second dish. It simply lists those stations for which a

⁸ It remains a mystery as to why in some markets, Echostar can “fit” seven or eight stations on the Dish 500 list, but in other markets there is only room for six. Interestingly, there are only six stations on the Dish 500 list in Indianapolis, and only seven in Nashville.

⁹ Eighth Annual Report, *In re: Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129, ¶57 (released January 14, 2002).

second dish is required. No instruction is given on how to go about getting the second dish.

No announcement is made that the second dish is free.

In fact, even a letter to subscribers dated January 1, 2002 fails to make these announcements. Terry Riley, a two-year Echostar subscriber and an employee of KWHD-TV, licensed to named commenter LeSea Broadcasting Corp., received the attached January 1st letter on or about January 8th.¹⁰ The letter announces packaging and pricing changes in Echostar's premium programming effective February 1, 2002, and first promotes a premium movie service. Next, in a paragraph sub-titled "New Local Channels At No Extra Charge," Echostar declares:

NEW channels were added January 1st to your local package including UPN, WB, PBS (normally sold separately) plus many others depending on the city*. The price of this package, when it includes PBS, continues to be \$5.99 a month. In order to accommodate the added channels to this local package, we have moved the local channels to the 8000 range on your On-Screen Guide. Enter 8-0-0-0 with your remote to see what is available with your receiver. If you currently receive one of our distant networks, you may see changes in your Distant Network package.

*Channels vary by market. Some channels may require the installation of additional hardware; installation available at no cost until 3/31/02.

Echostar's letter discriminates against independent stations on its face.

Independents or niche network stations are not mentioned at all. Only WB, UPN and PBS – stations that are on the Dish 500 system, and require no additional dish for reception – are mentioned. Echostar's footnote referring to these and other additional stations available by market states that "some" channels (but clearly not WB, UPN and PBS) "may require the installation of additional hardware." Echostar never states that this hardware will be free.

¹⁰ See Attachment A, January 1, 2002 Letter from DishNetwork to Denise & Terry Riley.

In fact, it says only that *installation* of the equipment will be free, and then only until March 31st! The language and design of the letter are specifically meant to avoid announcing to subscribers that other independent local stations are available or that equipment and installation to receive those stations is free.

Echostar's behavior is beyond being suspect – it is deliberate. Another portion of their January 1st letter announces a free pay-per-view movie coupon in appreciation for subscribers' continued business. Unlike the never announced free offer for reception of local independents, this free offer from Echostar most assuredly creates income rather than a liability for the company, because to announce this offer, Echostar capitalizes and bolds the word “FREE” not once, but twice. The economic model is clear -- if it benefits the company, put in bold; if it creates a potential liability, hide it.

Grouping independent and niche network stations on the “second dish,” limiting that group to one or two stations in many instances, refusing to mix widely viewed network and independent stations on second dish and Dish 500 status, hiding the availability of the independent stations, and refusing to promote the availability of these stations via “free” installation all combine to discriminate against and disenfranchise independent stations on Echostar's system. This discrimination is not by pure happenstance – it is deliberate, intentional and insidious.

B. If grouping independent and niche network stations on “second dish” status were not enough disincentive for subscribers, the hurdles and inconvenience of getting a second dish add even more.

Assuming that subscribers somehow divine, despite Echostar's deliberate evasions, that additional stations are available, figure out on their own that the equipment necessary to receive these stations is free, and ultimately decide to seek out having that equipment installed, the hurdles, confusion and inconvenience involved in getting that installed

equipment would deter even the most determined of subscribers. The following description of actual hurdles and confusion involved in getting the equipment illustrates this point.

Echostar subscriber Terry Riley, identified above, sought out the equipment necessary to receive commenter LeSea's KWHD-TV in the Denver market. Mr. Riley had to seek out the equipment to receive KWHD because the station is independent, and was relegated to "second dish" status by Echostar. Through his status as an employee of KWHD, he learned that KWHD would be available with a second dish. Without instructions from Echostar on how to get the additional equipment, Mr. Riley called Echostar technical support on December 28, 2002. He was told he would need additional equipment (a dish and a switcher) and that it would be installed free. Technical support transferred him to customer service, who told him he needed to pick a date for installation. He chose the first date convenient for him – January 7, 2002, and was told an installer would come out to his home within a pre-selected five-hour window. Installation could not occur without someone present at the home. Mr. Riley selected the 12 noon - 5 p.m. window.

On January 7th, the installer arrived in the last 15 minutes of the window. It took the installer 1.5 hours to install the dish and other equipment, during which Mr. Riley's presence was necessary. The installer added a second dish and switcher, and then told him that new receivers would also be necessary for Mr. Riley's upstairs and downstairs televisions. The installer only had one receiver on the truck, which he installed, and then told Mr. Riley he would have to return – during a second scheduled 5-hour window on January 10th – to install the second receiver. The installer left a statement of services specifying no charge for the equipment or work.

Mr. Riley's wife called Echostar on January 8th to make sure there was no charge for

the installation and equipment. Initially, she was informed that Echostar's computer reflected that she would be billed over \$200 for the work and equipment, but after she reminded the Echostar representative that it was supposed to be free, she was told it would only be \$99. After again asserting that the service and equipment was supposed to be free, the representative removed all charges reflected and informed her that no charges would apply.

Mr. Riley next realized he had a conflict with the January 10th installation appointment, and went to Echostar's local service center in Englewood, Colorado to cancel the appointment and to pick up the additional receiver himself. He installed the receiver himself, and as instructed, then called technical support for code numbers to begin programming. The technician initially made incorrect entries about the equipment installed, which delayed programming delivered to the receiver for an additional hour. Only after an additional call by Mr. Riley was the problem remedied.

By way of summary, Mr. Riley had complete reception of KWHD by way of an installed second dish and receive equipment 13 days after calling Echostar. He missed over 5 hours of work for the first visit, and only because he installed the second receiver himself, did not miss any additional work for a second visit. Set to be billed over \$200 for the "free" work and equipment, only his wife's timely call eliminated those charges. These hurdles and the confusion they cause are barriers to subscriber access that create another layer of discrimination against "second dish" stations.

Moreover, the average subscriber does not have the benefit of Mr. Riley's knowledge that local independent stations are available with a second dish and the equipment and installation are free, or the liberty to miss several hours of work for the installation. These difficulties add enough to the pre-existing disincentive arising out of what stations are

placed on the second dish satellite to effectively stop any Echostar subscriber from ever getting a second dish. The ultimate discriminatory effect is never having access to subscribers. Placing a signal on a satellite is one thing – subscribers actually receiving it is quite another. The FCC should clarify its rules so that Echostar can actually read in black and white what it already knows – that its actions, and any others that rob independent stations of access to subscribers, are discriminatory.

C. The named commenters previously filed complaints against Echostar.

To make matters worse, the very commenters herein that are licensees of stations were forced, by Echostar’s belligerence and threats, to previously file complaints at the FCC.¹¹ For LeSea’s WHMB-TV, Echostar refused carriage on signal quality grounds even though the station was only two miles from Echostar’s local receive facility! For CTN’s WHTN-TV, Echostar refused carriage until a station representative attended a testing session, and even then Echostar reserved the right to deny carriage. The same occurred for Carolina Christian’s WGGS-TV. Ever non-cooperative, Echostar’s initial response to the carriage complaints was threats that all legal action would be taken against them. Only after the FCC clarified that Echostar’s behavior was unacceptable, and after multiple rounds of negotiations between their counsel and Echostar’s David Goodfriend, were the bogus refusals and threats of “legal action” removed and an unconditional commitment to carry the stations provided. The complaints were then dismissed.

Not surprisingly for the FCC’s most recalcitrant DBS licensee, Echostar’s promise

¹¹ The following Cable Special Relief Numbers correspond to the commenters:

LeSea	WHMB	CSR-5755-M
LeSea	KWHD	CSR-5754-M
CTN	WHTN	CSR-5745-M
Carolina Christian	WGGS	CSR-5757-M

was illusory. For Echostar, the concept of reception is completely divorced from the issue of whether a station is carried or not. In conversations with Mr. Goodfriend after January 1, 2002, the undersigned counsel for the named commenters was informed that Echostar considered the stations “carried” under the FCC’s rules and that nothing about its “second dish” scheme was discriminatory. According to Echostar, nothing was unfair, and independent television stations should simply be told to tell their viewers who are Echostar subscribers to go out and get free dishes. Mr. Goodfriend would not even confirm that all stations would be moved to the Dish 500 orbital locations once Echostar launched additional satellites,¹² leaving open the possibility (or perhaps for Echostar, the likelihood) that nothing would change for disenfranchised stations once “spot” beam solutions were available to Echostar.

For these reasons, the HCC Commenters request that the FCC, in taking action in this proceeding, provide direct relief to stations affected by Echostar’s actions now or in the future by ordering Echostar to take specific remedial steps to eliminate the discriminatory effects of their “second dish” scheme, and by making clear that new complaints need not be filed by affected stations to enforce their individual carriage rights. Specific steps might include requiring Echostar to shuffle or re-locate non-broadcast programming delivered via satellite to free up enough space for all mandatory carriage stations. No station stuck on a

¹² On January 16, 2002, the FCC granted Echostar’s application to launch and operate another satellite, citing as public interest support Echostar’s claim that the new satellite would “enhance the system’s capacity to provide local broadcast signals under the broadcast carriage provisions of the SHVIA.” *In re: Echostar Satellite Corporation Application for Minor Modification of Direct Broadcast Satellite Authorization, Launch and Operating Authority for EchoStar 7*, DA-02-118, Order and Authorization, ¶2 (released January 16, 2002). HCC Commenters suggest that this professed goal is suspiciously vague, and provides no guarantee that Echostar will eliminate its “second dish” scheme.

second dish should be required to spend additional time and money filing complaints to enforce their carriage rights. The FCC's clarification should be enough, and should specify this one-time exception to rule 76.66(m)(6)'s requirement that complaints regarding carriage be filed within 60 days of an implicit or explicit denial of carriage.

IV. The issues presented may be resolved by declaratory ruling, without the need for further rulemaking.

In the *Public Notice*, the FCC specifically requested that all commenters address whether the issues raised in the Emergency Petition were appropriate for resolution by means of declaratory ruling, or other means of clarification, rather than by a formal rulemaking proceeding to amend the rules. Existing precedent strongly supports this proceeding be resolved by declaratory ruling or clarification.

Section 1.2 of the FCC's rules empowers the Commission, on its own or other motion, to issue a declaratory ruling to terminate a controversy or remove uncertainty. *See* 47 C.F.R. § 1.2; 5 U.S.C. § 554(e). In this proceeding, there is both a controversy to be resolved and uncertainty regarding the scope of the Act's non-discrimination provisions and the FCC's rules implementing same.

The controversy is clear. Echostar maintains that offering second dishes for free and placing some, but not all, local stations on the satellite linked to this dish is not discriminatory because customers do not have to pay for the second dish. Television broadcasters in Echostar's markets, including the HCC Joint Commenters, maintain that placing only independent and niche network stations on the second dish and requiring customers to obtain the dish, even if free, is discriminatory. Moreover, stations directly affected by Echostar's actions are participants in this proceeding, and thus "standing" is satisfied and supports the existence of a controversy. *See In Re: Omnipoint*

Communications, Inc., 4 CR 653, 655 (1996) (presence or absence of standing is useful factor to consider in determining whether controversy or uncertainty exists to warrant declaratory ruling).

Furthermore, it can be argued, albeit tongue-in-cheek, that some uncertainty exists here regarding the scope of the FCC's language in the *Recon. Order* stating that requiring customers to "obtain" a second dish to receive some, but not all, local stations would be discriminatory.¹³ Did the FCC's statement mean discrimination would result only if a customer had to pay for the second dish, or even if they only had to go through the necessary steps to obtain the dish for free from Echostar? The FCC's clarification of this question would remove that uncertainty. *See, e.g., In re: Inmate Calling Services Providers Task Force*, 2 CR 475, 482 (1996) (finding uncertainty surrounding proper regulatory treatment of inmate-only payphones, and thus support for declaratory ruling).

Finally, there are no factual disputes over the issue presented which would bar treatment of this proceeding as a declaratory ruling. If factual disputes were present, the Commission would be warranted in exercising its discretion to not take action. *See, e.g., In re: Access Charge Reform* (Fifth Report & Order), 17 CR 299, 353 (1999) (disagreement over access rate charge calculation method justified rulemaking instead of declaratory ruling). The facts underlying this controversy are undisputed. Echostar is placing a few independent and niche network local stations on a second dish, while the major network stations are available via customers' existing single dish. Customers could not receive these independent stations on January 1, 2002 with their existing Echostar equipment. Customers today still cannot receive these independent local stations unless they contact Echostar, ask

¹³ None of the HCC Joint Commenters concede this point, but proffer it for purposes of discussion of this issue.


for a second dish to be installed, make arrangements to be present for the installation, and are present for same. The absence of any disputed facts concerning this controversy provides strong, additional support for treatment of this proceeding as a declaratory ruling, or one ripe for clarification.

CONCLUSION

The HCC Commenters have been, and continue to be harmed by Echostar's discriminatory treatment of their stations. By requiring their customers to first realize on their own that other local stations are available and then take extraordinary actions to receive those stations, Echostar has reneged on its carriage obligation and chosen to discriminate against those stations it deems undesirable by relegating them to "second dish" status. Only clarification of the carriage rules by the FCC will resolve this matter, and restore proper carriage rights to affected local stations.

Respectfully submitted:

HCC COMMENTERS



Joseph C. Chautin, III
Hardy, Carey & Chautin, L.L.P.
110 Veterans Blvd, Ste. 300
Metairie, La 70005
(504) 830-4646

Dated: January 22, 2002

ATTACHMENT A



*****AUTO**5-DIGIT 80130

Denise & Terry Riley
10049 S Tarcoola Pl
Highlands Ranch CO 80130-6879

|||||

January 1, 2002

Dear Denise & Terry,

Effective February 1, 2002, you will see changes in the packaging and pricing of your DISH Network programming.

America's Top Programming and Premium Movie Services

All of our America's Top programming packages (including AT50, AT100 and AT150) and our premium movie services (HBO, Showtime, Starz and Cinemax), either as a single service or a premium package, will increase by \$1. Please note, if you are a Digital Home Plan customer or an I Like 9 customer in your first 12 months, your America's Top 100 or America's Top 150 will not increase prior to the end of your commitment period.

Price changes are due solely to increased rates from programmers, but we are pleased our rate increase is well below most cable rate increases across the country.

New Local Channels At No Extra Charge

NEW channels were added January 1st to your local package including UPN, WB, PBS (normally sold separately) plus many others depending on the city*. The price of this package, when it includes PBS, continues to be \$5.99 a month. In order to accommodate the added channels to this local package, we have moved the local channels to the 8000 range on your On-Screen Guide. Enter 8-0-0-0 with your remote to see what is available with your receiver. If you currently receive one of our *distant* networks, you may see changes in your Distant Network package.

FREE Pay-Per-View Coupon

In appreciation of your continued business, please enjoy a **FREE** movie on us and enjoy hits like Pearl Harbor, Shrek or Rush Hour 2. Just order a movie with your remote and send in the enclosed DISH On Demand Pay-Per-View coupon with your statement. It's that easy!

We believe DISH Network is the best value in television and we look forward to providing you the highest quality in television entertainment for years to come. For more information, please visit our website at www.dishnetwork.com. Thank you for your business.

Sincerely,

Soraya

Soraya Cartwright
Executive Vice-President
DISH Network

* Channels vary by market. Some channels may require the installation of additional hardware; installation available at no cost until 3/31/02.

ENGLOC

Certificate of Service

I hereby certify that a copy of the foregoing has been mailed to the following, via
certified mail or 1st Class U.S. Mail, postage prepaid, this 22nd day of January, 2002:

Henry J. Baumann
Benjamin F. P. Ivins
National Association of Broadcasters
1771 N. Street, N.W.
Washington, D.C. 20036

Robert E. Branson
Association of Local Television Stations
1320 19th Street, NW, Suite 300
Washington, D.C. 20036


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